

I.

STATEMENT OF THE CASE

On June 24, 2008, a federal grand jury returned a two-count indictment charging Defendant Jessica Michelle Alfaro ("ALFARO") with knowingly and intentionally importing approximately 19.34 kilograms (approximately 42.55 pounds) of marijuana, in violation of 21 U.S.C. Sections 952 and 960 (Count 1); and knowingly and intentionally possess, with intent to distribute approximately 19.34 kilograms (approximately 42.55 pounds) of marijuana, in violation of Title 21, United States Code, Sections 952 and 960 (Count 2).

On July 9, 2008, the Defendant was arraigned on the Indictment and entered a plea of not guilty. The motion hearing is scheduled for September 5, 2008 at 11:00 a.m.

II

STATEMENT OF THE FACTS

A. **INCIDENT**

1. **Primary Inspection**

On June 24, 2008, at approximately 3:45 a.m., Jessica Michelle Alfaro made entry into the United States from Mexico through the Calexico, California, West Port of Entry. Alfaro was the sole occupant, driver, and registered owner of a black 2003 Ford Focus with California license plate number 5AMP255.

Alfaro presented a California driver's license and a U.S. birth certificate to United States Customs and Border Protection Officer (CBPO) M. Roberts at primary inspection lane #7. Alfaro told CBPO Roberts that she had been visiting her husband in Mexicali, Mexico, who had been deported to Mexico. Alfaro also gave a negative declaration. During his inspection, CBPO Roberts was notified by CBPO S. Parish that his narcotics detector dog had alerted to the front bumper of the vehicle. Alfaro said she was returning home to San Bernardino, California. Alfaro was referred to secondary inspection after her personnel data was inputted into the TECS system.

2. Secondary Inspection

At the secondary lot, CBPO Terriquez approached the vehicle and Alfaro. Alfaro showed her California drivers license to CBPO Terriquez and gave him a negative customs declaration. Alfaro stated that she only had a bag of candy. Alfaro said she was heading back home to San Bernardino and that she was the registered owner of the vehicle. CEO Parish conducted his inspection of the vehicle with his NDD Lucy who alerted to the front bumper of the vehicle. CBPO Terriquez and CEO Parish then discovered a non factory compartment inside the front bumper. Alfaro was escorted to the secondary lot office where a pat down search was conducted in a private room with negative results. In the non factory compartment, CBPO Terriquez and CEO Parish discovered 36 packages. CBPO Terriquez probed a random package and a green leafy substance which tested positive for marijuana was discovered. CBPO Terriquez placed Alfaro under arrest.

B. ALFAROS' POST-ARREST STATEMENT

On June 24, 2008, a digitally recorded audio/video taped sworn statement was conducted of Alfaro by Border Patrol Special Agent Timothy Henderson in the Calexico Station/Sector Intelligence Groups Interview Room. Alfaro was given her Miranda warnings as per Service Form I-214, in English. Alfaro waived her rights and agreed to make a statement. Alfaro stated, that she knew there was drugs in the car, but didn't know what kind and, that she was to be paid \$1,000 to take the car to San Bernardino.

III.

POINTS AND AUTHORITIES

A. THE GOVERNMENT WILL COMPLY WITH ALL DISCOVERY OBLIGATIONS

The Government has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. 3500), and Rule 16 of the Federal Rules of Criminal Procedure. The Government anticipates that all discovery issues can be resolved amicably and informally, and has addressed Avalos' specific requests below:

(1) **Defendant's Statements.** The Government recognizes its obligation under Rules 16(a)(1)(A) and 16(a)(1)(B) to provide to Avalos the substance of his oral statements and his written

1 statements. The Government has produced all of Avalos' statements that are known to the undersigned
2 Assistant U.S. Attorney at this date. If the Government discovers additional oral or written statements
3 that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be provided to
4 Avalos.

5 The Government has no objection to the preservation of the handwritten notes taken by any of
6 the agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must
7 preserve their original notes of interviews of an accused or prospective government witnesses).
8 However, the Government objects to providing Avalos with a copy of the rough notes at this time. Rule
9 16(a)(1)(A) does not require disclosure of the rough notes where the content of those notes have been
10 accurately reflected in a type-written report. See United States v. Brown, 303 F.3d 582, 590 (5th Cir.
11 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require
12 disclosure of an agent's notes even where there are "minor discrepancies" between the notes and a
13 report). The Government is not required to produce rough notes pursuant to the Jencks Act, because
14 the notes do not constitute "statements" (as defined in 18 U.S.C. § 3500(e)) unless the notes (1)
15 comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or
16 adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough
17 notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States
18 v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks
19 Act where notes were scattered and all the information contained in the notes was available in other
20 forms). The notes are not Brady material because the notes do not present any material exculpatory
21 information, or any evidence favorable to Avalos that is material to guilt or punishment. Brown, 303
22 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to the
23 defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3rd
24 Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient). If,
25 during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks
26 Act, or Brady, the notes in question will be provided to Avalos.

27 **(2) Brady and Giglio Material.** The Government has and will continue to perform its duty
28 under Brady to disclose material exculpatory information or evidence favorable to Avalos when such

evidence is material to guilt or punishment, including arrest reports and dispatch tapes. The Government recognizes that its obligation under Brady covers not only exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on behalf of the United States. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667, 676-77 (1985). This obligation also extends to evidence that was not requested by the defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107-10 (1976). “Evidence is material, and must be disclosed (pursuant to Brady), ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc). The final determination of materiality is based on the “suppressed evidence considered collectively, not item by item.” Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

Brady does not, however, mandate that the Government open all of its files for discovery. See United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000)(per curiam). Under Brady, the Government is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the defendant from other sources (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the defendant already possesses (see United States v. Mikaelian, 168 F.3d 380-389-90 (9th Cir. 1999) amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the undersigned Assistant U.S. Attorney could not reasonably be imputed to have knowledge or control over. See United States v. Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001).

Brady does not require the Government “to create exculpatory evidence that does not exist,” United States v. Sukumolahan, 610 F.2d 685, 687 (9th Cir. 1980), but only requires that the Government “supply a defendant with exculpatory information of which it is aware.” United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976).

(3) Any Proposed Rule 404(b) Evidence. The Government will provide Avalos with any information regarding Avalos’ known prior criminal offenses. The Government will disclose in sufficient time advance of trial, the general nature of any “other bad acts” evidence that the Government intends to introduce at trial pursuant to Fed. R. Evid. 404(b). To the extent possible, the Government will provide the Rule 404(b) evidence to CASTRO within two weeks prior to trial. The Government

1 will also provide notice of all impeachment evidence by prior criminal convictions as required by Fed.
2 R. Evid. 609.

3 (4) **Defendant's A-file.** As previously discussed, the Government recognizes its obligation
4 under Brady and Giglio to provide material evidence that could be used to impeach Government
5 witnesses.

6 **B. GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY**

7 **1. Rule 16(b)**

8 Defendant has invoked Federal Rule of Criminal Procedure 16(a) in his motion for discovery
9 and the Government has already voluntarily complied with the requirements of Federal Rule of Criminal
10 Procedure 16(a). Therefore, Rule 16(b) should presently be determined to be operable as to Defendant.

11 The Government, pursuant to Rule 16(b), hereby requests that Defendant permit the Government
12 to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects,
13 or make copies of portions thereof, which are within the possession, custody, or control of Defendant
14 and which he intends to introduce as evidence in his case-in-chief at trial. The Government further
15 requests that it be permitted to inspect and copy or photograph any results or reports of physical or
16 mental examinations and of scientific tests or experiments made in connection with this case, which are
17 in the possession or control of Defendant, which she intends to introduce as evidence-in-chief at the trial
18 or which were prepared by a witness whom Defendant intends to call as a witness. The Government
19 also requests that the Court make such orders as it deems necessary under Rule 16(d)(1) and (2) to insure
20 that the Government receives the discovery to which it is entitled.

21 **2. Rule 26.2**

22 Federal Rule of Criminal Procedure 26.2 requires the production of prior statements of all
23 witnesses, except any statement of Defendant. The rule provides for the reciprocal production of Jencks
24 statements. The time frame established by the rule requires the statement to be provided after the
25 witness has testified, as in the Jencks Act. Therefore, the Government hereby requests that Defendant
26 be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set
27 by the Court. This order should include any form these statements are memorialized in, including, but
28 not limited to, tape recordings, handwritten or typed notes, and/or reports.

IV.

CONCLUSION

For the foregoing reasons, Alfaro's motion should be denied.

DATED: August 29, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

s/ Randy K. Jones
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08CR2267-DMS

Plaintiff,)

v.)

JESSICA MICHELLE ALFARO,)

Defendant.)

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, RANDY K. JONES, am a citizen of the United States and am at least eighteen years of age.
My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **United States' Response and Opposition to Defendant's Motion to Compel Discovery Together with Statement of Facts and Memorandum of Points and Authorities** on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Gregory Murphy, gregory_murphy@fd.org

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 29, 2008

s/ Randy K. Jones
RANDY K. JONES